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No. 667

In the Supreme Court of the United States

OCTOBER TERM, 1958

W. A. RUSHLIGHT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Bass v. *United States*, 221 F. 2d 494, certiorari denied, 350 U.S. 827	6, 8
Bull v. *United States*, 295 U.S. 247	9, 10
Rothensies v. *Electric Storage Battery Co.*, 329 U.S. 296	7, 10, 11
Stone v. *White*, 301 U.S. 532	9, 10
United States v. *California Eastern Line*, 348 U.S. 351	6

Statutes:

Renegotiation Act of 1942, 56 Stat. 245, as amended, 58 Stat. 78, 50 U.S.C. App. 1191, *et seq.*:	
§ 403(a)(4)(C)	4, 9
§ 403(c)	4
§ 403(e)(2)(iv)	2
§ 403(e)(1)	7
§ 403(e)(2)	3

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OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon (R. 63-66) is not reported. The *per curiam* opinion of the United States Court of Appeals for the Ninth Circuit and concurring opinion (Pet. App. B) are reported at 259 F. 2d 658.

JURISDICTION

The judgment of the Court of Appeals was entered on September 29, 1958 (R. 87; Pet. App. B, p. 25). A timely petition for rehearing was denied on November 12, 1958 (R. 88). The petition for a writ of

certiorari was filed on February 6, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals correctly ruled that the Tax Court's determination of petitioners' excessive profits for 1942 under the Renegotiation Act was binding on the District Court, and was, in any event, correct under the applicable provisions of the Act.

STATUTES INVOLVED

The applicable provisions of the Renegotiation Act of 1942, 56 Stat. 245, as amended, 58 Stat. 78, 50 U.S.C. App. 1191, *et seq.*, are set forth in Appendix A to the petition.

STATEMENT

This action was brought by the United States in the United States District Court for the District of Oregon under § 403(c)(2)(iv) of the Renegotiation Act (Pet. App. A, p. 17) to recover excessive profits made by petitioners during the year 1942 on certain Government war subcontracts (R. 3-12). On December 5, 1957, that court granted summary judgment for the United States in the amount of $48,330.99 plus interest from September 5, 1956 (R. 67-71). On subsequent appeals by both parties,[1] the Court

[1] The cross-appeal of the United States was predicated on the District Court's failure to award it interest from the date of original demand of excessive profits from the contractor. The District Court awarded interest only from the date of the final Tax Court redetermination ten years later.

of Appeals affirmed the judgment of the District Court.

The pertinent facts may be summarized as follows:

Petitioners were partners in the W. A. Rushlight Company, organized on March 12, 1942, with its principal place of business during the year 1942 in Portland, Oregon (R. 47). During the period March 27, 1942 to December 31, 1942, petitioners received or accrued $471,485 primarily from the performance of Government contracts or subcontracts for the installation of plumbing and heating equipment at Walla Walla Air Base, Washington (R. 48, 52, 53). From these sales, subject to renegotiation under the Renegotiation Act of 1942 (R. 49), petitioners realized profits, before renegotiation, of $137,393 (R. 49).

In accordance with the provisions of the Renegotiation Act, the War Department Price Adjustment Board, on December 18, 1945, unilaterally determined that petitioners had realized excessive profits in the amount of $80,000 from its renegotiable contracts during the period March 27, 1942 to December 31, 1942 (R. 6-10). On the same date, petitioners were notified of the determination of $80,000 by the Chairman of the War Department Price Adjustment Board (R. 11). In this notification, the Chairman formally demanded payment of the renegotiation debt, less any applicable tax credit (R. 11).

Within ninety days subsequent to the Board's determination and pursuant to § 403(e)(2) of the Renegotiation Act of 1943 (Pet. App. A, p. 20), peti-

tioners filed a petition in the Tax Court of the United States seeking a redetermination of their excessive profits as determined by the War Department Price Adjustment Board (R. 30). During the proceedings before the Tax Court, petitioners attempted to introduce into evidence a certain exhibit (R. 37) allegedly demonstrating petitioners' profits and losses for the years 1943, 1944 and 1945 (R. 41). However, the Tax Court, in agreement with the Government contention that the Act prohibited "carry-over or carry-back [of losses] under any circumstances" [§ 403(a)(4)(C), Pet. App. A, pp. 18-19], considered such evidence immaterial and incompetent (R. 41). And after trial in the Tax Court, that court entered an order on September 5, 1956, based on detailed findings of fact and an opinion, redetermining petitioners' excessive profits in the amount of $66,700 for the relevant period March 27, 1942, through December 31, 1942 (R. 32, 46-55).

Previously, on November 26, 1946, as authorized by § 403(c) of the 1942 Act (Pet. App. A, pp. 17-18), the Government filed a complaint in the District Court seeking to recover the unpaid 1942 excessive profits of $80,000 less applicable tax credits (R. 3-12). The District Court action was held in abeyance pending the redetermination proceeding in the Tax Court and settlement of the applicable tax credit. Following the September 5, 1956, Tax Court decision and determination of the tax credit, the Government filed a final amended complaint in the District Court seeking judgment in the amount of $66,700 (the Tax Court's redetermined amount of excessive profits)

less a tax credit of $10,553.98, making the debt sued for $56,146.02 plus interest (R. 28-32).

In their answer to this complaint, petitioners did not quarrel with the amount of the principal debt for 1942 but alleged, by way of defense, that their losses for the years 1944 and 1945 had not been considered by the Tax Court (R. 33-37). Petitioners alleged, in effect, that such losses in subsequent years from renegotiable contracts nullified any excessive profits for the year 1942 (R. 33-37). In addition, petitioners filed requests for admissions asking the Government to admit petitioners' attempt in the Tax Court to introduce evidence showing subsequent losses and that such evidence had been ruled inadmissible by the Tax Court (R. 39-42).

On April 2, 1957, the Government moved to strike this defense and the requests for admissions and also moved for summary judgment, asserting, *inter alia*, that the District Court did not have jurisdiction to review or redetermine matters decided by the Tax Court, that the decision of the Tax Court was *res judicata*, and that there was no dispute or question of fact relating to the amount of the debt stemming from the determination of excessive profits as finally and conclusively determined for 1942 by the Tax Court (R. 42-45). On December 5, 1957, the District Court, after concluding that it lacked jurisdiction to consider matters raised in the Tax Court and that the Tax Court's determination of the amount of the principal debt was binding on the District Court, granted the Government's motions awarding the Government the principal amount sought less a

payment of accrued interest which the court applied to principal (R. 67-71).

On petitioners' appeal, the Ninth Circuit affirmed, *per curiam*, holding that the Tax Court's decision was binding on the District Court (Pet. App. B, pp. 22-23). Moreover, the court observed, the Renegotiation Act did not permit the carry-back of losses in subsequent years as contended for by petitioners. In a concurring opinion (Pet. App. B, p. 24), Judge Hamley agreed with the court on applicable legal principles but disagreed with any expression of sympathy for petitioners' situation since the record before the court did not indicate the reasons for the losses sustained in 1944 and 1945.

ARGUMENT

As the Court of Appeals observed, petitioners' reliance on an argument of "equitable recoupment" with regard to different renegotiable contracts performed in different years is misplaced for two principal reasons. The argument was pressed by petitioners before the Tax Court, rejected by that court, and taken up again by petitioners only by way of defense to the Government's enforcement action in the District Court. However, at this latter stage of the proceedings, the decision of the Tax Court was conclusive and binding on the District Court. *Bass* v. *United States*, 221 F. 2d 494 (C.A. 8), certiorari denied, 350 U.S. 827; see also, *United States* v. *California Eastern Line*, 348 U.S. 351. In any event, as noted by the court below, the contention of equitable recoupment asserted by petitioners constitutes no

more than an attempt to obtain a carry-back of losses from subsequent years to nullify their 1942 excessive profits. This attempt must fail since the Renegotiation Act expressly precludes such a carry-back. Moreover, completely aside from the statutory prohibition, the doctrine of equitable recoupment as enunciated in earlier decisions of this Court has no application to the facts here. See *Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. 296. Hence the decision below is clearly correct, there is no conflict in decisions, nor is there any other reason for further review by this Court.

1. As is evidenced by petitioners' answer to the Government's final amended complaint in the District Court, their argument here and in the District Court and Court of Appeals, that losses in 1944 and 1945 from renegotiable contracts should nullify the determination of excessive profits for the year 1942, was also urged on the Tax Court by petitioners (R. 35-36). That court, agreeing with the Government that § 403(a)(4)(C) (Pet. App. A, pp. 18-19) expressly prohibited the carry-back of losses in this way, rejected petitioners' offer of proof of losses in 1944 and 1945 as immaterial and incompetent (R. 41). Under the statute, § 403(e)(1), Pet. App. A, p. 19, the Tax Court's subsequent determination of excessive profits for 1942 was conclusive and binding with regard to the District Court collection proceeding in all respects. *Bass* v. *United States*, 221 F. 2d 494 (C.A. 8), certiorari denied, 350 U.S. 827; see also, *United States* v. *California Eastern Line*, 348 U.S. 351.

Thus, as stated by the Eighth Circuit in *Bass, supra*, (221 F. 2d at 496-7):

> We think the District Court could not, under the circumstances, logically have done otherwise than grant the motion of the United States for a summary judgment. As the District Court ruled, the decision of the Tax Court in the redetermination proceeding initiated by the defendants in that court, which proceeding was between the same parties with respect to the same claim, was res judicata not only as to all questions presented to the Tax Court but as to all questions which could have been presented to that court. * * *
>
> The Tax Court alone had jurisdiction to redetermine the amount of excessive profits realized by the defendants. * * * Any questions as to jurisdiction of the Under Secretary of War to determine excessive profits or of the Tax Court to decide the issues presented to it and any questions as to the constitutionality of the Renegotiation Act or the proceedings taken under it were subject to review under 26 U.S.C. § 1141. * * * Since we are convinced that the decision of the Tax Court could not be reviewed, reopened or collaterally attacked in the District Court and was res judicata as to the validity and amount of the Government's claim, there is no justification for stating the various contentions of the defendants relating to the alleged invalidity of the claim.

2. (a.) In any event, as the Court of Appeals properly ruled, petitioners' contention flies in the face of the statutory prohibition against a carry-back of losses in determining excessive profits for any one

year. Section 403(a)(4)(C), Pet. App. A, pp. 18-19, expressly provides that for purposes of determining excessive profits for a given year, "no amount shall be allowed as an item of cost * * * by reason of the application of a carry-over or carry-back under any circumstances".

Petitioners, in an attempt to avoid this obvious bar to their position, now concede, in contrast to their position in the Tax Court, that the Tax Court was precluded from considering losses in 1944 and 1945 by the statutory prohibition against carry-backs. Nonetheless, petitioners argue, in effect, that while § 403(a)(4)(C) reflects Congressional intention with regard to the Tax Court, the sweeping prohibition therein against carry-backs is inoperative whenever the Government is forced, as it was here, to resort to a collection suit in the District Court. Of course, the complete answer to this argument is that Congress never intended the statutory bar against carry-backs to be so emasculated.

(5.) Finally, the authorities relied on by petitioners in support of their argument of equitable recoupment have been sharply limited by this Court and are clearly distinguishable from this case. *Stone* v. *White*, 301 U.S. 532, and *Bull* v. *United States*, 295 U.S. 247, the principal decisions relied on by petitioners, were both tax cases. In each, a single transaction had been subjected to two taxes on inconsistent legal theories. Nonetheless, in each case, defendant's claim, while otherwise valid, was barred by the applicable statute of limitations. And in each case this Court permitted recoupment, stressing that "re-

coupment is in the nature of a defense arising out of some feature of the transaction on which plaintiff's action is grounded". *Bull* v. *United States*, *supra*, at 262.

Subsequently, in *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, a taxpayer sued to recover income and excess profits taxes assessed and paid on a refund in 1935 of excise taxes erroneously paid between 1922 and 1926. The taxpayer claimed that, if this refund had been properly taxable, the Court, under *Bull* and *Stone*, should permit recoupment of other excise taxes erroneously paid between 1919 and 1922, recovery of which was barred by the statute of limitations. This Court, however, refused to extend the doctrine of recoupment in tax litigation beyond the facts of *Bull* and *Stone*, holding that recoupment "has never been thought to allow one transaction to be offset against another, but only to permit a transaction which is made the subject of suit by a plaintiff to be examined in all its aspects * * *". 329 U.S. at 299.

Closely akin to the claim of the taxpayer in *Rothensies* and unlike the situation in either *Bull* or *Stone*, petitioners below attempted to offset losses stemming from renegotiable contracts performed in 1944 and 1945 against the excessive profits determination arising out of their performance of completely separate renegotiable contracts in 1942. Moreover, petitioners' losses in 1944 and 1945 were derived almost entirely from their operation in those years of a "Steel Works Division" of the partnership (R. 37), work not even remotely related to the performance

of the plumbing and heating subcontracts completed in 1942 and from which the excessive profits in question were realized. Consequently, even if there were no statutory bar to carry-backs in the Renegotiation Act, petitioners' recoupment contention would in no way meet the requirements of this Court's decision in *Rothensies*.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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